

**OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management**

MEMORANDUM OM 05-55

April 11, 2005

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Richard A. Siegel, Associate General Counsel

SUBJECT: Filing a Motion to Strike Respondent's Answer When It
Contains Denials not in Conformance with Section 102.21
Of the Board's Rules and Regulations

Recently, a referral of attorney misconduct was made to the undersigned under Section 102.177 of the Board's Rules and Regulations that raised the issue of whether an attorney had asserted denials in an answer to a complaint where there was no legitimate basis for contesting the matters disputed and it appeared that the answer was made solely for the purpose of delay. For example, if an attorney denies a union's labor organization status even though the attorney stipulated to this status in a related representation case, absent some new development or legitimate basis for contesting the matter, the attorney would be interposing a denial without a sufficient basis. Although not a frequent problem, such frivolous denials can cause the General Counsel and other parties to the case to prepare witnesses to refute the denial of such allegations and to issue subpoenas on matters not genuinely in dispute, generate litigation over the validity and scope of the subpoenas, and substantially lengthen the time necessary to litigate a case before an administrative law judge. And, importantly, such responses can be in violation of the Board's Rules and the ABA Model Rules of Professional Conduct.

Section 102.21 of the Board's Rules and Regulations clearly provides:

The signature of the attorney or non-attorney party representative constitutes a certificate by him/her that he/she has read the answer; that to the best of his/her knowledge, information, and belief **there is good ground to support it; and that it is not interposed for delay.** If an answer is not signed or is signed with intent to defeat the purpose of this section, it may be **stricken as sham and false** and the action may proceed as though the answer had not been served. For a willful violation of this section an attorney or non-attorney party representative may be subjected to appropriate disciplinary action. [Emphasis added]

The ABA Model Rules of Professional Conduct provide:

Rule 3.1 Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

(highlighted words added in 2001).

In order to implement effective measures to curtail abuse of the Board's process, Regions should take the following steps upon receipt of an answer to a complaint filed by an attorney or representative of a party¹ that asserts a denial that is not supported by good grounds and appears to be interposed solely for the purpose of delay. After receipt of such an answer, the Region should send a letter to the attorney or representative citing Section 102.21 and asserting that the answer or a portion of the answer appears to have been filed without good grounds to support it and that it was interposed for delay. The letter should further inform the attorney or representative that Counsel for the General Counsel intends to file a motion with the administrative law judge to strike the answer or a portion of the answer as sham and false and requesting that the administrative law judge "proceed as though the answer had not been served." Section 102.21. See NLRB Casehandling Manual (ULP) Section 10280.2 Motion to Strike Improper Answer.

When such letters are sent, we expect that many attorneys and representatives will file an amended answer. However, if an attorney or representative does not thereafter file an amended answer but persists in contesting matters without good grounds to support it, Counsel for the General Counsel should, in most cases, prepare and file with the administrative law judge a motion to strike such answer as a sham and request that the relief provided in Section 102.21 of the Board's Rules and Regulations be granted, together with the documentary evidence in support thereof.² In addition, in such circumstances, immediately after the conclusion of the hearing, the Region should consider whether it is appropriate to make a referral of alleged attorney

¹ If the respondent files an answer without the assistance of an attorney or other representative, the Board has generally given such a party more latitude in reviewing the sufficiency of the answer because such a pro se party is generally unfamiliar with the Board's Rules and Regulations and procedures. See, e.g., *S & P Electric*, 340 NLRB 1 (2003); and *A.P.S. Production*, 326 NLRB 1296 (1998). In such circumstances, the Region should provide the pro se party with an explanation of the Board's Rules and Regulations regarding the sufficiency of the answer.

² In some cases, it may also be appropriate to contact the Division of Advice regarding the possibility of seeking as a special remedy in the underlying unfair labor practice proceeding that respondent be ordered to pay a portion of the General Counsel's attorney's fees incurred as a result of the filing of an answer without good grounds to support it.

misconduct under the Section 102.177 of the Board's Rules and Regulations to the undersigned for investigation and consideration of the institution of disciplinary proceedings against such attorney or representative.

If you have any questions regarding this memorandum, please contact your Assistant General Counsel or Deputy or the undersigned.

/s/
R.A.S.

cc: NLRBU
Release to the Public

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